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JAMES H. McKENNEY,
Clerk.

No. 102

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 1, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

C. G. Burroughs, Walker and Centre Streets, N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 102.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Plaintiff in Error,

AGAINST

MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The defendant in error moves to dismiss, on the ground that no final judgment has ever been entered in this cause.

There is no basis for such a contention.

1. The record shows that a judgment was in fact entered in the action.

(a) On May 13th, 1898, a demurrer was interposed to the amended complaint herein on the ground that

the Circuit Court of the United States had no jurisdiction of the subject matter of the action, and that no federal question was involved therein (Rec., p. 16).

(b) On March 22d, 1899, it appears that judgment was entered in the following language (Rec., p. 17) :

" This cause heretofore submitted to the court on demurrer herein came on regularly for decision, and thereupon it is ordered that the demurrer herein be, and the same hereby is, sustained and cause dismissed for want of jurisdiction herein."

(c) The certificate on the question of jurisdiction after stating the dismissal of the action on the ground of want of jurisdiction, recites :

" * * * and the plaintiff being desirous of suing out of writ of error from the order and decree of this court in sustaining said demurrer and dismissing said action and having this day applied to this court for a certificate as required in such cases : The court hereby certifies," etc. (Rec., p. 18).

(d) The certificate further recites (Rec., p. 24) :

" The court further certifies that upon the said amended complaint this court sustained said demurrer *and entered its decree dismissing said action*, holding that a federal question was not presented by said allegations and that in consequence thereof there was no jurisdiction in this court in said action."

(e) The allowance of the appeal to this court is as follows (Rec., p. 26) :

" It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States *the judgment heretofore entered herein dismissing the plaintiff's complaint, etc.*

(f) The assignment of errors refers to the judgment of the Circuit Court in this cause (Rec., pp. 26, 27).

(g) The bond on appeal likewise refers to the judgment (Rec., p. 27).

(h) The writ of error begins with the recital (Rec., p. 28) :

" Because in the record and proceedings, as also in the rendition of the *judgment* of a plea, which is in the said Circuit court," etc.

(i) The citation requires the defendants in error to show cause, if any there be, " *why the judgment in said writ of error mentioned should not be corrected*" (Rec., p. 30).

2. Furthermore, the instrument appearing on page 17 of the record, which the defendant in error denominates an order, is in reality a judgment, and is reviewable as such.

In *Fuller vs. Claflin (93 U. S., 14)* it was held that an order striking out an answer, since it ends the cause, leaves the action undefended, and confers a right to immediate judgment, is subject to review.

In *Ex parte Baltimore and Ohio R. R. Co. (108 U. S., 566)* it was held that where a Circuit Court on demurrer vacated and quashed a writ of replevin for want of jurisdiction, it was a final judgment, and if the case was otherwise within the court's jurisdiction, was subject to review on a writ of error.

In *Gumbel vs. Pitkin (113 U. S., 545)* it was held that an order dismissing the petition of a creditor who intervened in an action in which a writ of attachment had been issued and levied, is likewise reviewable by writ of error.

Nothing was required to be done to make the decision of the Court as evidenced by this document effective. It pronounced judgment in and of itself. It was not a mere authority to the clerk to enter judgment. It was pronounced in open court, and at once entered upon the records as the act of the Court. It

did not provide for the future entry of a judgment "in accordance with the order," as was the case in *Dale vs. Coppell (53 Mo., 321)*, cited by the defendant in error. It not only ordered that the demurrer be sustained, but it directed that the cause "be and the same *hereby* is" dismissed for want of jurisdiction herein.

To require a more formal judgment would involve needless repetition and add an unnecessary technicality to legal procedure, which is already sufficiently refined.

If the document under consideration is not in legal effect a judgment, then the plaintiff in error might at any time in the remote future sue out a writ of error when a more formal judgment has been entered. Such a result would not be in conformity with reason or justice.

All other questions discussed in the brief of the defendants in error in this case are sufficiently considered in the briefs filed by the appellant in Case No. 103.

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